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MAURICE BUJANG

v.

PETER NANSIAN NGUSIE

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HIGH COURT SABAH & SARAWAK, KUCHING

CLEMENT SKINNER J

[SUIT NO: 22-142-2006-I]

13 DECEMBER 2006

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CIVIL PROCEDURE: *Injunction - Injunctive relief - Application for - Application to restrain defendant from continuing to trespass on disputed area - Whether far greater hardship and harm would result to plaintiff than to defendant if injunction sought not granted - Whether damages an adequate remedy - Whether balance tilted in favour of maintaining status quo*

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This was an *inter partes* hearing of an application for injunctive relief by the plaintiff who claimed to have acquired native customary rights over a parcel of land measuring four acres at Sebangis, 15th Mile, Jalan Kuching/Serian Sarawak ('the said land'). The defendant claimed to have acquired native customary rights over a piece of land measuring some 16.03 acres which lay next to the said land. The defendant also claimed that his 16.03 acres included a substantial portion of the said land ('the disputed area'). The defendant had started works to prepare his 16.03 acres of land for development into detached bungalow housing lots and had cleared a pathway through the disputed area of the said land. The plaintiff alleged that in clearing the pathway the defendant had cut down and damaged fruit trees and crops which the plaintiff had planted there, causing him to suffer losses and damages which he would continue to suffer unless the defendant was restrained from continuing to trespass on the disputed area of the said land. The defendant denied that he was trespassing on the disputed area of the said land as alleged and claimed that the whole of the disputed area which he had cleared on the said land for use as a pathway belonged to him. Alternatively, the defendant submitted that he should not be stopped from using the pathway because he could apply to the relevant authority including the Director of Lands and Surveys for access or right of way to the land subject to payment of compensation. Accordingly, the defendant submitted that it would be futile for the court to grant the injunction sought.

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Held:

- (1) The plaintiff, a retiree, had invested considerable time, effort and expense to cultivate vegetables, crops and fruit trees on the said land including in the disputed area where the pathway had been cleared. The plaintiff was carrying on subsistence farming on the land he occupied including the disputed area which was also a means of livelihood. In the circumstances, the damages would not be an adequate remedy to him if he was prevented from undertaking these activities in the area cleared by the defendant for the pathway. Further, the defendant intended to turn his land into housing lots which would be offered for sale to the public. The pathway which the defendant had cleared on the disputed area was intended to serve as access to these housing lots. If so, the character and use of the land where the pathway was cleared would be changed, perhaps irreversibly, from present agriculture use of land in its natural state to a right of way over which a tar sealed road would be built. In these circumstances, damages would not be an adequate remedy to the plaintiff as it would represent a permanent loss of land use. (paras 8 & 9)
- (2) By insisting that the plaintiff be denied injunction he sought unless he could show that he was able to fulfill his undertaking in damages, the defendant was effectively asking the court to shut its doors to the plaintiff for what he was *ie*, a poor litigant. In such situations, this court was more concerned with the essential justice of a case than questions of financial ability of the parties. Further, the defendant's reliance on his right to apply to the director for a right of way was odd. On the one hand he claimed the disputed area on which the pathway was built belonged to him. But if he were to go to the Director to apply for a right of way, then it must be on the basis that the land over which he sought a right of way belonged to the plaintiff. If that was so then it was inconsistent with his present claims before this court. A party should not be allowed to blow hot and cold on a matter in issue just to suit the position he takes at a particular point in time. (paras 11, 12 & 14)
- (3) The plaintiff used the disputed area including the area over which the pathway had been built for subsistence farming while the defendant used the pathway to achieve a financial goal. The plaintiff was a retiree who depended on what he had

- A planted. The defendant was a person of substantial means involved in 'other business' and so the present development activities must be just one of his business activities. If the injunction sought was not granted, far greater hardship and harm would result to the plaintiff than to the defendant. The
- B balance tilted in favour of maintaining the *status quo*. The *status quo* which was to be preserved was the situation that prevailed before the defendant commenced his activities to build the pathway over the disputed area. (para 15)

C [Order accordingly.]

Case(s) referred to:

Allen v. Jumbo Holdings Ltd [1980] 2 All ER 502 (*refd*)
Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah & Ors [1995] 1 CLJ 293 CA (*refd*)

- D For the plaintiff - Julian Tan (Charles Antau with him); M/s Tang & Antau
For the defendant - Ani Solep; M/s Ani Solep

Reported by Suhainah Wahiduddin

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JUDGMENT

Clement Skinner J:

- F [1] This is the *inter partes* hearing of an application for injunctive relief by the plaintiff who claims to have acquired native customary rights over a parcel of land measuring some 4 acres at Sebangis, 15th Mile, Jalan Kuching/Serian Sarawak ('the said land').
- G [2] The defendant claims to have acquired native customary rights over a piece of land measuring some 16.03 acres, which lies next to the said land. The defendant claims that his 16.03 acres includes a substantial portion of the said land. I will refer to that area of the said land which the defendant claims to be his as 'the disputed area'.
- H [3] The defendant has recently since about August 2006 started works to prepare his 16.03 acres of land for development into detached bungalow housing lots. To this end the defendant has sent in heavy equipment to do land clearing works on his land,
- I but to gain access to the area of land which he is presently working on, the defendant cleared a pathway through the disputed area of the said land over which his heavy equipment and workers

pass and repass. The plaintiff alleges that in clearing the pathway the defendant has cut down and damaged fruit trees and crops which the plaintiff had planted there causing him to suffer loss and damage which he will continue to suffer unless the defendant is restrained from continuing to trespass on the disputed area of the said land by using the pathway. The defendant denies that he is trespassing on the disputed area of the said land as alleged. He claims that the whole of the disputed area which he has cleared on the said land for use as a pathway belongs to him. Therefore he claims to be fully entitled to do what he did and says that he will continue to use the pathway over the disputed area of the said land as access to his area of land he is working on.

[4] It is not in dispute between the parties that the plaintiff has filed a claim against the defendant at the Native Court, claiming ownership of the disputed area of the said land. The defendant is resisting the plaintiff's claim in the Native Court.

The Law

[5] The approach I should take in deciding this application is set out for my guidance by the Court of Appeal in *Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah & Ors* [1995] 1 CLJ 293. Briefly stated, that case held that at this stage of the case the questions I should ask myself are first, whether the totality of the facts presented before me discloses a *bona fide* serious issue to be tried; if so, then I should go on to consider where the justice of the case lies. In making this assessment I must take into account all relevant matters, including the practical realities of the case. Further, I must keep in the forefront of my mind that the remedy that the court is asked to administer is discretionary, intended to produce a just result for the period between the date of this application and the trial proper and to maintain the *status quo*. With that I turn to consider the questions that I need to ask myself.

Are There Bona Fide Triable Issues?

[6] On the totality of the materials placed before me I am satisfied that the competing claims of the plaintiff and the defendant to be the rightful owners of the disputed area of the said land, including that area of land over which the pathway has been cleared gives rise to a serious issue to be tried.

A The Balance Of Justice

[7] In considering whether the balance of justice lies in favour of or against the grant of an injunction I have taken into account the following factors:

B Is Damages An Adequate Remedy?

[8] As far as the plaintiff is concerned I am satisfied that damages are not an adequate remedy to him if the court should eventually decide the case in his favour. The plaintiff, a retiree, has invested considerable time, effort and expense to cultivate vegetables, crops and fruit trees on the said land including in the disputed area where the pathway has been cleared. The crops planted include tapioca, banana, papaya and dragon fruit. I consider the plaintiff to be carrying on subsistence farming on the land he occupies including the disputed area. It is also a means of livelihood. In the circumstances, damages would not be an adequate remedy to him if he is prevented from undertaking these activities in the area cleared by the defendant for the pathway. Further, the defendant intends to turn his land into housing lots which will be offered for sale to the public. The pathway which the defendant has cleared on the disputed area is intended to serve as access to these housing lots. If so the character and user of the land where the pathway is cleared will be changed, perhaps irreversibly, from present agriculture use of land in its natural state to a right of way over which a tar sealed road is built. In these circumstances damages would not be an adequate remedy to the plaintiff as it will represent a permanent loss of land use.

[9] On the other hand, as far as the defendant is concerned, I find that damages would be an adequate remedy to him if he were to eventually win this case. The activities on his land are directed towards developing his land into housing lots for sale to the public with a view to turning a quick profit for himself. If he is now restrained from using the pathway, he will be delayed in making the profit he anticipates. If the defendant eventually wins this case, clearly his remedy is in damages which is easily quantifiable.

Relative Financial Strength Of The Parties

[10] The defendant says he is a person of substantial financial means. He says he is a Chartered Accountant by training. He is a three-term Member of the Dewan Undangan Negeri Sarawak. He previously held a senior position in the Bintulu Development

Authority. He has unit trust investments. He owns landed properties as well as strata titles. He is also involved in business. Plainly stated, the defendant says he is a wealthy man who is well able to meet his undertaking to pay any damages the court may award against him for using the pathway and so he should not be restrained from using the pathway in the meantime.

[11] On the other hand, the defendant says that while the plaintiff has given his undertaking in damages, he is a mere retiree and therefore his ability to meet his undertaking in damages is seriously in doubt and therefore the injunction he seeks should be refused.

[12] I do not agree with the defendant's contention. The defendant may well be a person of considerable wealth, but poverty is not a bar to obtaining injunctive relief in appropriate cases. This is such a case. The plaintiff here is a retiree and small land owner. The defendant as well as the court should accept this fact. By insisting that the plaintiff be denied the injunction he seeks unless he can show that he is able to fulfil his undertaking in damages, the defendant is effectively asking the court to shut its doors to the plaintiff for what he is ie, a poor litigant. To me, in situations such as this the court is more concerned with the essential justice of a case than questions of financial ability of the parties (see *Allen v. Jumbo Holdings Ltd* [1980] 2 All ER 502).

Alternative Remedy

[13] The defendant submitted that he should not be stopped from using the pathway because he 'can always apply to the relevant authority including the Director of Lands and Surveys for access or right of way to my land subject of course to payment of compensation'. Accordingly the defendant says it would be futile for the court to grant the injunction sought. I do not agree. While such an avenue may be available to the defendant, it would still be at the discretion of the Director of Lands and Surveys whether or not to grant a right of way. That discretion which the Director has must be exercised in accordance with well settled principles. So the defendant may or may not get the right of way he applies for. In the meantime it would be wrong to allow him to behave as if he has.

- A [14] Further, the defendant's reliance to his right to apply to the Director for a right of way is odd to say the least. On the one hand he says the disputed area on which the pathway is built belongs to him. But if he goes to the Director to apply for a right of way, then it must be on the basis that the land over which he
- B seeks a right of way belongs to the plaintiff. If that is so then it is inconsistent with his present claims before this court. A party should not be allowed to blow hot and cold on a matter in issue just to suit a position he takes at a particular point in time.

C **The Practical Realities**

- D [15] The practical realities of the case before me is that while the plaintiff uses the disputed area including the area over which the pathway has been built for subsistence farming, the defendant uses the pathway to achieve a financial goal. The plaintiff is a retiree who depends on what he has planted. The defendant is, from what he says, is a person of substantial means involved in 'other business' and so the present development activities must be just one of his business activities. It is not difficult to see that if the
- E injunction now sought is not granted, far greater hardship and harm would result to the plaintiff than to the defendant. The balance tilts in favour of maintaining the *status quo*. The *status quo* which is to be preserved is the situation that prevailed before the defendant commenced his activities to build the pathway over the
- F disputed area and thereafter pass and repass over it with equipment and workmen.

[16] For all the above reasons I grant the plaintiff prayer 1 and 2 only of his application, with costs.

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